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In the Supreme Court of the United States

No. 75-163

CALIFORNIA and HAWAIIAN SUGAR COMPANY, HOLLY SUGAR CORPORATION, CONSOLIDATED FOODS CORPORATION, GREAT WESTERN SUGAR COMPANY, AMERICAN CRYSTAL SUGAR COMPANY, and AMALGAMATED SUGAR COMPANY,

Petitioners,

vs.

THE HONORABLE
United States District Court for the Northern District of California,

Respondent,

UNITED STATES of AMERICA, and ROBERT J. STAAL, its Attorney,

Real Party in Interest.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

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California and Hawaiian Sugar Company, Holly Sugar Corporation, Consolidated Foods Corporation, Great Western Sugar Corporation, American Crystal Sugar Company, and Amalgamated Sugar Company pray that a writ of certiorari issue to review the order of the Court of Appeals for the Ninth Circuit in the con-

All emphasis in quotations in this petition is added unless otherwise stated.

solidated cases of *California and Hawaiian Sugar Company, et al. v. District Court,* No. 75-1547, and *Great Western Sugar Co., et al. v. District Court,* No. 75-1548, rendered on May 19, 1975.

OPINIONS BELOW

The district court rendered no formal opinion; its reasoning appears in the transcript of proceedings set out in Appendix 5 hereto. The Court of Appeals rendered no opinion; its orders are set out in Appendices 6, 7, and 8.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1651. The order of which review is sought was made by the Court of Appeals on May 19, 1975; on July 2, 1975, the Court of Appeals denied a timely petition for rehearing.

QUESTIONS PRESENTED

In an indictment under Section 1 of the Sherman Act the charging paragraph identifying the claimed conspiracy alleged that the substantial terms of the conspiracy included "among others" certain specified objectives. Petitioners (the accused) moved to dismiss the indictment because the words "among others" left the charge open-ended in violation of the Sixth Amendment. To avoid the issue, the government moved to strike the words "among others", and the trial court granted the motion. The Court of Appeals refused to prohibit prosecution upon the pruned indictment. *Ex parte Bain,* 121 U.S. 1 (1887), established that an indictment may never be amended by prosecutor or court, that if amended it is no longer an indictment or accusation on which prosecution can be based, and that there is no jurisdiction to proceed further.

Is the rule of *Bain* no longer the law? Has it been "eroded" or "reinterpreted" as the government contends? Can the accused be compelled to stand trial because the words left, after the pruning, in the paper denominated "indictment" allege an offense, although not the offense charged by the Grand Jury?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia . . .

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . .

Sherman Act, § 1 (as in effect at the relevant times) (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U.S.C. § 1):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousands dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

28 U.S.C. § 1651(a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

A. Proceedings in the District Court

In December, 1974, a grand jury in the Northern District of California returned two indictments charging violation of Section 1 of the Sherman Act.[1] Except for the market areas allegedly affected by the conspiracy and the identity of certain of the named defendants, the language of the two indictments was identical. The charging paragraphs of the indictments[2] alleged a combination and conspiracy in restraint of trade

"the *substantial terms of which were, among others:*

(a) to fix and raise the basis prices of refined sugar;

(b) to fix prepaid freight applications;

(c) to eliminate, reduce and prevent giving of allowances to customers for refined sugar; and

(d) to fix, raise, maintain and stabilize the effective selling price of refined sugar."

Defendants promptly moved to dismiss the indictments.[3] One ground was that, by including the phrase "among others" in the charge of the substantial terms of the conspiracy, the indictments violated defendants' Sixth Amendment right to be informed of the nature and cause of the accusations against them, because the phrase, "among others", left the charge fatally open-ended.

In its response to the motions to dismiss the government *conceded* that the phrase is open-ended and might later be the means by which the prosecutor could add substantial terms to the

1. *United States v. California and Hawaiian Sugar Company, et al.*, No. CR 74-829 RHS, and *United States v. Great Western Sugar Company, et al.*, No. CR 74-830 RHS.

2. Paragraph 11 in *Great Western, et al.* and paragraph 10 in *California and Hawaiian, et al.*: the full text of the latter indictment appears as Appendix 1.

3. The motions appear as Appendices 2 and 3.

indictment.[4] It did not so much seek to defend this defect as to cure it, by moving to strike the phrase "among others". (Appendix 4) The purpose of the motion to strike was to escape the need of confronting the issue whether inclusion of the words "among others" in the charging paragraphs of the indictments invalidated them. The seriousness of that issue, so evaded by the government, can be stated by a summary of the submission made in support of the motions to dismiss, as follows:

As often noted, the device of a conspiracy charge is "elastic, sprawling," capable of being a "serious threat to fairness in our administration of justice" (e.g., Justice Jackson's opinion in *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) approved in *Grunewald v. United States*, 353 U.S. 391 (1957)). The circumspection required by this fact is all the more essential in the charge of a Sherman Act conspiracy, for there, unlike conspiracies under the general conspiracy statute (18 U.S.C. § 371), the conspiracy is on the common law footing, *Nash v. United States*, 229 U.S. 373, 378 (1913). No overt acts are necessary, nothing need be done to effectuate the conspiracy, and the crime consists solely in the concert together. Consequently, the *objectives* of a Sherman Act conspiracy (plus the identity of the conspirators) are the only means by which to identify the conspiracy and to distinguish it

4. The government's Memorandum in Opposition to Motions to Dismiss contained the following:

"Defendants argue that the indictments should be dismissed since the phrase 'among others' in the charging paragraphs of the indictments provides a vehicle for expanding the grand jury's charge. Arguably, additional terms of the conspiracies to restrain trade could be added by the Government under the 'open-ended' phrase 'among others' in those paragraphs. * * *" (p. 12)

* * *

"The substantial terms of the charged conspiracies are basically ways in which the defendants were charged with violating the Sherman Act. The 'among others' phrases which arguably may be the means of later adding substantial terms to the indictments may constitutionally be stricken and the overall charges thus narrowed." (p. 17)

from any other conspiracy. Unless circumspection in the charge of objectives is insisted on, it is a mere exercise in verbiage for the prosecution to slice one conspiracy into several, to be prosecuted concurrently or *seriatim* as conviction on one fails or as vindictiveness seeks multiple punishment (e.g., *United States v. American Honda Company*, 271 F.Supp 979 (N.D.Cal. 1967)), or to meld into one conspiracy what in fact were several inchoate ones so as to permit the insufficient evidence of any one to be bolstered by insufficient evidence of the others (*Kotteakos v. United States*, 328 U.S. 750 (1946)).[5]

The vagueness of the phrase "among others" in the charging paragraph violated the Sixth Amendment in that it forced the court as well as the petitioners to speculate as to what the grand jurors intended and does not protect against double jeopardy. The indictments were therefore invalid under the principles of *Russell v. United States*, 369 U.S. 749 (1962), for the presence of the words "among others" would allow the prosecutor to "roam at will" to offer evidence of an agreement that may have been either specifically rejected by the Grand Jury or not even in its mind. The presence of the words would permit new charges and new theories of guilt as the case progressed. The charging paragraph was expandable to make every fact or theory relevant and contractible whenever necessary to escape a failure of proof or the consequence of collapse of a theory.

On February 28, 1975, the district court granted the government's motion to strike and denied the defendants' motion to dismiss the indictments because, as pruned, each indictment stated an offense.

B. Proceedings in the Court of Appeals

On March 10, 1975, petitioners in each case applied to the Court of Appeals for a writ of prohibition against further pro-

5. Particularly where, as here, the indictments stated that there were still other conspirators, unindicted and unnamed but not alleged to be unknown to the Grand Jury.

ceedings in the district court on the indictments, on the grounds (a) that by virtue of the amendment worked by the order to strike, the indictments no longer existed, and (b) that courts have no power to retailor an indictment through amendment or otherwise, and particularly no power to give life to an indictment invalid when returned by the grand jury.

The cases were consolidated, and on March 24, 1975, a two judge panel of the Court of Appeals granted an alternative writ, staying proceedings in the district court until disposition of the petition. (Appendix 6) On May 19, 1975, the Court, by a different two judge panel, denied the petition for a writ, without opinion (Appendix 7); on June 11, 1975, it formally dissolved the stay of proceedings in the district court (Appendix 8); and, on July 2, 1975, it denied a petition for rehearing that had been filed on May 27, 1975 (Appendix 9)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A writ of certiorari is necessary to prevent a criminal prosecution where there is no accusation or charge on which to proceed.[6]

The fundamental issue is whether the rule of constitutional law announced in *Ex Parte Bain*, 121 U.S. 1 (1887), has been eroded away. In *Bain* this Court laid down the flat rule, derived not only from the common law but from the Fifth Amendment,[7] that a

6. This Court can itself issue a writ of mandamus or prohibition directly to the district court to confine it to a lawful exercise of its jurisdiction, as in *Ex Parte Peru*, 318 U.S. 578, 584-5 (1943), but since application was made to the Court of Appeals this Court can act upon the latter by certiorari, as in *Beacon Theatres, Inc. v. Westover*, 3579 U.S. 500 (1959) and *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972) where the Court of Appeals had refused to permit an interlocutory appeal for lack of jurisdiction.

7. The constitutional standards are enforced whether the indictment is one for a misdemeanor or a felony. Although a person accused of a misdemeanor need not be initially charged by a grand jury, if he is so indicted that indictment must remain the indictment of the grand jury, and the same rules apply. *Russell v. United States*, 369 U.S. 749 (1962); *United States v. Goldstein*, 502 F.2d 526, 530-31 (3 Cir. 1974); *United States v. Fishetti*, 450 F.2d 34 (5 Cir. 1971), *cert. denied*, 405 U.S. 1016.

court cannot amend an indictment in any respect, that any amendment nullifies the indictment and strips the court of jurisdiction to proceed, for no accusation longer exists on which prosecution can rest. "The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* entered." 121 U.S. at 13. There the indictment charged the accused with conduct "to deceive the Comptroller of the Currency and the agent appointed" by him to conduct an examination. The words "the Comptroller of the Currency and" were surplusage, unnecessary to state an offense; indeed, defrauding the Comptroller was not stated by any statute to be an offense. On motion of the government the trial court struck the words "the Comptroller of the Currency and" as surplusage, and Bain was tried and convicted on the indictment as so amended. This Court ordered him released on *habeas corpus*.[8]

This Court has never departed from the *Bain* rule; on the contrary, it has extended it. *Stirone v. United States,* 361 U.S. 212 (1960). The government has not questioned that *Bain* laid down a flat prohibition. In its brief below, it argued that the *Bain* rule had been *"eroded"* through the years of inclusion and exclusion and that "The Bain rule *as reinterpreted by subsequent decisions no longer* prohibits amendments which have the effect of *narrowing* rather than broadening the charge."[9] To the government, all that is required is that, after a court strikes allegations, enough is still left to state a crime; it asserts:

> "A factual allegation in an indictment is 'surplusage' if the indictment states an offense without it. Such surplusage may be disregarded." (Government's Memorandum in Opposition to Petition for Writ in the nature of Prohibition, p. 5)

Bain, it was thus conceded, once prohibited the course the government espouses, but it was claimed that *Bain* does so *no longer* because of a "reinterpretation". But it was not claimed that the "reinterpretation" or "erosion" has been worked by this Court, nor could it be. The supposed "erosion" and "reinterpretation" are the work of some of the lower courts, and largely within the last ten years. For decades the lower courts adhered to the *Bain* rule. But more recently they have fallen into a state of utter confusion and conflict, which grows worse year by year. This conflict and confusion are to be found not only between circuits but within them. In *Heisler v. United States,* 394 F.2d 692, 695-6 (9 Cir. 1968), *cert. denied* 393 U.S. 986 (1968), the court commented that ". . . the progeny of *Bain* are out of joint.". In *United States v. Edwards,* 465 F.2d 943, 950 (9 Cir. 1972), the same court stated:

> "The law with respect to the formal or informal amendment of indictments, the disregard of parts of an indictment as 'surplusage,' and the like, is in the confused state, as pointed out in Heisler. . . ."

As late as January, 1975, the Second Circuit in *United States v. Cirami,* 510 F.2d 69, 72, citing *Edwards, supra,* acknowledged that the law is in a "confused state". The court below, while writing no opinion in the instant cases, issued an opinion on May 2,

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8. Said the Court:
"It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence."

9. Government's Memorandum in Opposition to Petition for Writ in the Nature of Prohibition, p. 2.

1975, in *United States of America v. Dawson,* No. 73-2356 (not yet reported) which states that court's present view. There it refers to the history of the *Bain* rule as a "confusing and inconsistent history", and states:

> "Although the language *and rationale of Bain* are exceptionally broad, in the considerable time that has passed since *Bain* was decided, the courts have engrafted several exceptions and limitations on this 'no amendment rule,' . . . ."

But the grafts upon the *Bain* rule have not been made by this Court. Certain it is that the numerous standards applied by the lower courts defy any unified analysis. The range of confusion may be suggested—but even then not fully displayed—by a summary.

The District of Columbia Circuit adheres strictly to *Bain;* in any but a case "where the error is merely a minor procedural matter", "the indictment . . . cannot be interfered with";[10] *Bain* "excludes any notion of a non-prejudicial amendment to the indictment."[11] The Second Circuit originally viewed striking of "surplusage" as "error of the most serious kind",[12] and even insertion by the trial court of a comma in a corporate name was condemned.[13] This year, 1975, it uttered its comment on the state of confusion.[14] The Third Circuit once permitted deletion of "surplusage",[15] but later sought to find a discernible line between a change which a court might believe leaves the accusation the same as brought by the grand jury and one by which the indictment becomes "through interpolation the indictment of the prosecutor or the court." "[16]

10. *United States v. Stamp,* 458 F.2d 579, 767 (1971).

11. *Gaither v. United States,* 413 F.2d 1061, 1072 (1969).

12. *Dodge v. United States,* 258 Fed. 300, 305 (1919).

13. *United States v. Consolidated Laundries Corp.,* 291 F.2d 563, 571-2 (1961).

14. *United States v. Cramit,* 510 F.2d 69, 72 (1975).

15. *United States v. Krepper,* 159 F.2d 958, 971 (1946).

16. *United States v. De Catalcante,* 440 F.2d 1264, 1271 (1971).

More recently it has returned to the view that *Bain* established a *per se* rule against any judicial amendment whatever to the terms of the indictment.[17] Some courts distinguish between "form" and "substance", but what is "form" is itself in a state of disarray. *Bain* conceived of "form" as relating to matters not in the body of the indictment, such as the caption (121 U.S. at 7). The Fifth Circuit appears to consider any *subtraction* from the body of the indictment as form.[18] But Judge Brown of that circuit asserts that *Bain* permits no amendment whatever to the body of the indictment.[19] The Fifth Circuit has permitted an amendment which, it says, has the effect of "narowing" the indictment.[20] In the Seventh Circuit an indictment may be amended to correct a typographical error or transposition of digits.[21] The Eighth Circuit appears to allow elimination of clerical errors.[22]

The decisions in the Ninth Circuit go every way. It first held and later adhered to the view that striking anything, whether regarded as surplusage or not, from the body of the substantive charge is not to be tolerated.[23] Later it condemned the amendment of a typographical error.[24] Still later it asserted that no amendment "by physical notations on the face of the indictment" or "by an express instruction to the jury that the court had stricken certain words from the indictment" is permissible.[25] Later it

17. *United States v. Somers,* 496 F.2d 723, 724 (1974).

18. *Marsh v. United States,* 344 F.2d 317, 322 (1965).

19. Dissenting in *Overstreet v. United States,* 321 F.2d 459, 463 (1963).

20. *Thomas v. United States,* 398 F.2d 531, 539 (1967).

21. *United States v. Denny,* 165 F.2d 668, 670 (1947), *cert. denied,* 333 U.S. 844 (1948); *United States v. Skelly,* 501 F.2d 447, 453 (1974).

22. *Stewart v. United States,* 395 F.2d 484, 488 (1968).

23. *Stewart v. United States,* 12 F.2d 524 (1926); *Edgerton v. United States,* 143 F.2d 697 (1944).

24. *Carney v. United States,* 163 F.2d 784, 790 (1947).

25. *United States v. Harvey,* 428 F.2d 782, 784 (1970).

returned to permitting amendment of a typographical error,[26] and later still, after noting the confusion of the law, approved an instruction to the jury to disregard something thought to be "surplusage" even over defendant's objection citing F.R.Crim.P. Rule 7(d) which limits the authority to strike to a defendant's motion to strike.[27] And the most recent Ninth Circuit case in which an opinion was issued, *United States v. Dawson* (May 2, 1975), states that the "foremost" exceptions and limitations on *Bain's* "no amendment rule" relate to "correction of typographical errors", or making changes that are "merely a matter of form . . . ."

The lower courts also differ over the consequences of a disapproved amendment to the indictment. *Bain* likened the amendment to a *nolle prosequi,* as a result of which there no longer remains in existence *any* accusation upon which any prosecution could proceed. Yet in *Stewart v. United States,* 16 F.2d 863 (1926), the Ninth Circuit, over strong dissent, held that the original indictment could be deemed restored to life and that prosecution could proceed on it. The Third Circuit fully accords with the dissenting view in *Stewart,* holding in *United States v. Williams,* 412 F.2d 625 (1969) that "an indictment expires if it be amended in a matter of substance other than by the grand jury of the sovereign who returned it" and that the court "lost its jurisdiction to impose any penalty", the government's only recourse being to seek a reindictment.

All the inconsistencies and confusions of lower courts, all the "erosion" and "re-interpretation," are traceable to a misunderstanding of what this Court held in *Salinger v. United States,* 272 U.S. 542 (1926). The significant feature of *Salinger* is that it by-passed the Court of Appeals and came before this Court on a direct writ of error to the trial court under Section 238 of

26. *United States v. Buble,* 440 F.2d 405, 406 (1971).

27. *United States v. Edwards,* 465 F.2d 943 (1972).

the Judicial Code as it existed in 1924. On such a direct review only constitutional questions were open, all other errors being reviewable only by appeal to the Court of Appeals. Nothing had been stricken from the indictment in *Salinger.* After all the evidence at trial was in, the accused requested that part of the charge be withdrawn from the jury as unsupported by the evidence, and the trial court acceded to the request in its instructions to the jury. The error claimed on the direct appeal was not one of striking anything from the indictment, but one of *variance* between charge and proof. All that the Court held is that that kind of question presented no constitutional issue. This Court simply said (p. 549), ". . . whether this [ruling] was right or wrong—*as to which we intimate no opinion*—it did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision . . ." and therefore did not involve the *Bain* rule.

The provisions of Section 238 of the Judicial Code under which *Salinger* came before this Court had already been repealed before *Salinger* was decided, and no such direct appeal has been part of federal procedure for the past 50 years. Lack of familiarity with that kind of limited review may account for the failure of lower courts in more recent years to observe the narrowness of the *Salinger* decision.

In *Gaither v. United States,* 413 F.2d 1061 (D.C.Cir. 1969), the scholarly opinion examines the decisions and notes the distinction between *amending* an indictment, which runs afoul of the constitution, and *variance* between charge and proof, which does not (p. 1071). The "accepted rule is that a variance does not call for a dismissal of the indictment except upon a showing of prejudice," whereas any amendment of an indictment is "flatly" forbidden. *Gaither* noted that this distinction between amendment and variance had led prosecutors to try to evade the *Bain* rule by a device: "Rather than amend the terms of an

indictment, a prosecutor simply proves the facts which the amended indictment would have charged. Thus instead of an amendment, there is a variance." (413 F.2d at 1072) Cases will be found among the circuits that permit withdrawal of part of a charge by instructions to the jury,[28] and these decisions have spilled over into decisions about amending the indictment. Thus, in the latest Ninth Circuit case in which there is an opinion, *United States v. Dawson* (May 2, 1975) the court noted that there was no striking of anything from the indictment but a "withdrawing from the trial jury's consideration (for lack of evidence) a portion of the indictment under which defendant was tried"; "the judge's instruction [to the jury] merely removed from the jury's consideration a charge not supported by the evidence."

Even this variance "device" can go too far. In *Gaither* the court went on to observe that *Stirone v. United States*, 361 U.S. 212 (1960), "limited the use of this [variance] device". The variance in *Stirone* was so extreme that this Court regarded it as tantamount to an amendment of the indictment and struck it down as violating the flat rule of *Bain*. *Stirone* thus extended the *Bain* rule, and yet, incredibly, it is the source of the view of some courts that *Stirone* restricted *Bain* to amendments of an indictment which expand rather than narrow the charge.

Courts departing from *Bain's* positive command, and drawing distinctions between amendments "narrowing" a charge and those "expanding" it, proceed upon the erroneous notion that

28. *E.g., United States ex rel Epton v. Nenna*, 446 F.2d 363 (2 Cir. 1971); *United States v. Colasurdo*, 453 F.2d 585 (2 Cir. 1971), distinguishing between a *Bain* type case of amendment of an indictment and one of instruction to the jury.
United States v. Goldstein, 502 F.2d 526 (3 Cir. 1974).
Vincent v. United States, 337 F.2d 891 (8 Cir. 1964).
Heisler v. United States, 394 F.2d 692 (9 Cir. 1968); the court dwelt on the fact that "the indictment was never amended in the literal sense" but was baffled by the distinction between a *Bain* situation and a variance.

only two functions are served by an indictment, one to inform the accused of the charges against him so that he will not be taken by surprise and the other to protect him against double jeopardy. Therefore, they reason, as did the Fifth Circuit in *Williams v. United States*, 179 F.2d 656, 659, "If an indictment complies with these [two] requirements, it is sufficient, and ordinarily an indictment may be amended provided that the amendment does not violate the above requirement." But in the words of Judge Brown, dissenting in *Overstreet v. United States*, 321 F.2d 459, 462 (5 Cir. 1963), this Court had "recently reminded", in *Russell v. United States*, 369 U.S. 749 (1962), that an indictment serves still another major purpose, to protect one against the charge of crime. Or, as this Court stated later in *Jenkins v. McKeithen*, 395 U.S. 411, 431 (1969), "the grand jury is designed to interpose an independent body of citizens between the accused and the prosecuting attorney and the court." *Gaither v. United States*, 413 F.2d 1061, 1066 (D.C. Cir. 1969) appreciated this same fact that the function of a grand jury is to exercise independent *discretion* about what to prosecute. No prosecutor or court may be permitted to speculate that the grand jury would have indicted on any set of facts minimally sufficient to state some crime or on any facts either less than or different from those alleged in the true bill. A rule permitting the court to judge gradations of substance in the presentment of the grand jury cannot coexist with prohibition against speculation on what was in the minds of the grand jury. Mr. Justice Stewart expressed the law thus in *United States v. Fabrizio*, 385 U.S. 263, 275 (1966):

> "We long ago rejected the notion that 'it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest changes

. . . .' *Ex Parte Bain,* 121 U.S. 1, 10. See *Stirone v. United States,* 361 U.S. 212; *Russell v. United States,* 369 U.S. 740, 770-771."

Although this passage is in a dissenting opinion, it stated no difference with the majority opinion and correctly reports what was held in *Bain, Stirone* and *Russell.* So in *Russell,* the Court had said (369 U.S. 749, 760):

> "to allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the grand jury was designed to secure."

Nevertheless, the history recited above demonstrates that unless this Court now speaks on the subject lower courts will continue their bewildering "reinterpretations" of *Bain,* a process that fits the description of what this Court hoped to avoid when it decided that case:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own motions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to the suggested changes, the great importance which the common law attaches to an indictment by a grand jury . . . may be frittered away until its value is almost destroyed." (121 U.S. at 10.)

Doubtless lower courts have been led astray by reacting against the trifling nature of some of the things stricken from indictments, or corrections like a transposition of serial numbers, or changing the tense of a verb from the indicative to the subjunctive, or a reference to a counterfeit bill as a $20 bill instead of a $10. Thus in *United States v. Dawson, supra,* the Ninth Circuit said that the principal engrafted exceptions on the *Bain* rule

relate to corrections of typographical errors or matters of form. Whatever may be said about that kind of correction, it has no relevance to the present case or what other lower courts are doing. Perhaps, also, there is room for letting a case go to the jury despite a variance, on the theory that an unproved allegation is "surplusage", despite the fact that *Bain* dealt with what, to a trained legal eye, was surplusage. One can understand, if not condone, how some courts have strained to validate action in the context of an appeal after trial and conviction of an accused who may even have urged or consented to alteration of the grand jury's accusation.

But this case involves no trifles and no problem of variance after trial. What it involves is the pernicious idea that a court can remake a grand jury's charge if only, after the pruning, it can find sufficient words in the indictment to constitute a charge of an offense although no one can know whether it is the offense that moved the grand jury to action. This case relates to the *identification of the conspiracy* charged. If the grand jury found or suspected a wider conspiracy than that which would be charged with the words, "among others", deleted, petitioners were entitled to be apprised, with clarity, what the wider conspiracy was. If the grand jury had not believed that there was a wider conspiracy, it might not have indicted at all. The inclusion of the words "among others" as one of the "substantial" objectives of the conspiracy inescapably states that the grand jury indicted for a conspiracy whose objectives included more than the specific objectives listed. On the other hand, if the grand jury did not intend a wider conspiracy, then the "among others" phrase was a device designed to give the prosecution freedom of action. The only other explation is that the Assistant United States Attorney who drafted the indictment for the grand jury was inept. But as stated by Judge Brown in his dissent in *Overstreet v. United States,* 321 F.2d 459, 463 (5 Cir. 1963) the "vital function of

the Grand Jury ought not to be whittled down to extricate prosecutors from the consequences of slovenly draftsmanship."

If the indictments with the words "among others" were void as violative of the Sixth Amendment under the principles of *Russell v. United States, supra,* patently the invalidity could not be avoided by striking the words. At a minimum the Fifth Amendment prohibits amendments which seek to give life to void indictments. To hold otherwise would be to "create jurisdiction" where none had existed. *Chow Bing Kew v. United States,* 248 F.2d 466 (9 Cir. 1957), *cert. denied,* 355 U.S. 889 (1957). And whatever the force of the arguments that might be mustered to defend the indictments as returned by the grand jury and to repel the charge that they are void, the government chose not to stand and defend. It obtained an amendment in order to sidestep a decision on the validity of the indictment. The net effect of granting the motion to strike and denying the motion to dismiss was to order petitioners to trial on an accusation never made by the grand jury. Deletion of the words in the indictment altered the identity of the Sherman Act conspiracy with which petitioners were being charged.

Furthermore, to characterize the deletion of the words "among others" as "narrowing" the charge is a play on words. The deletion permits the prosecutor to prove his case with *less* evidence, and thus subjects the accused to a *greater* risk. That is the reverse of narrowing a charge. The contention returns one to the fundamentals of a Sherman Act, Section 1 conspiracy charge. To establish that kind of offense nothing more is required than the agreement. The agreement is identified by its objectives. An agreement for numerous objectives is different from one with less; to substitute a charge of an agreement with fewer objectives for one with more is to charge a different kind of conspiracy and one easier to prove. Narrowing the charge linguistically is to broaden it in actuality.

Compelling Necessity of Correction Now

Prerogative writs are not substitutes for an appeal from a final judgment or a means of curing "error". But forcing petitioners to the expense of preparation and trial cannot be characterized as merely "error" curable by an appeal from a later conviction. In *Roche v. Evaporated Milk Association,* 319 U.S. 21, 26 (1943), the Court drew a line between inappropriate and appropriate situations for issuance of a prerogative writ, and it explicitly pointed to the *Bain* situation as the prime instance in which such a writ should issue, for the most fundamental office of a prerogative writ is to prevent a lower tribunal from acting where it has no jurisdiction. To a free people the most obnoxious example of acting without jurisdiction is to prosecute one without an accusation properly returned and existing. *Bain* held explicitly:

> "The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. [121 U.S. at 9, 10]
>
> . . .
>
> "the grand jury is as valuable as ever in securing . . . 'citizens' 'from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of such a jury' ". (p. 12)
>
> and "after the indictment was changed it was no longer the indictment of the grand jury who presented it." (p. 13)

Here, after the motion to strike was granted, no accusation by anyone authorized to make an accusation, according to established procedures, exists. The Court of Appeals should have prohibited the prosecution. This Court has held that courts of appeal should have issued writs to prevent deprivation of the constitutional right of trial by jury in a civil case. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 511 (1959); *Dairy*

Queen v. Wood, 369 U.S. 469, 472 (1962). Important as is the right of trial by jury in a civil case, far more fundamental is the right not to be prosecuted without a proper formal accusation. The institution of the grand jury antedates the petty jury in English law.

CONCLUSION

This Court some years ago denied a petition for certiorari purporting to proffer for review the present status of the *Bain* rule, *United States v. Colasurdo,* 453 F.2d 585 (2 Cir. 1971), *cert. denied,* 406 U.S. 917 (1972). But that was a *Salinger* type of case, not a case of striking from an indictment (*see* fn. 28, *supra*). Never has there been a case presenting the issue so bluntly as now. Whether the *Bain* rule has eroded, and its present life and meaning, are patently in confusion among the lower courts, and that confusion continues and accelerates. There is urgent necessity for present guidance from this Court.

Unless a writ issues, these two cases will go to trial after the most arduous preparation and consumption of time of court and counsel, and, yet, unless the *Bain* rule is now dead, there is no jurisdiction on which a prosecution can proceed.

We respectfully submit that the petition should be granted.

San Francisco, California, July 28, 1975

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JOHN W. KEKER
Attorney for Holly Sugar Corporation
JAMES J. BROSNAHAN
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Appendices Follow

Appendix 1

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United States District Court
Northern District of California

Filed Dec. 19, 1974
Clerk, U.S. Dist. Court
San Francisco

United States of America,
Plaintiff.

v.

California and Hawaiian Sugar Company;
Holly Sugar Corporation; and
Consolidated Foods Corporation,
Defendants.

Criminal No. CR 74 829 ACW

INDICTMENT
15 U.S.C. § 1
(Sherman Antitrust Act)

The Grand Jury charges:

I

DEFINITIONS

1. As used herein:

(a) "Refined sugar" means any grade or type of saccharine product derived from sugar beets or sugar cane which contains sucrose, dextrose or levulose;

(b) "Refiner" means any company engaged in the processing of sugar beets or the refining of raw cane sugar into, and the sale of, refined sugar;

(c) "Basis price" means the list price of refined sugar sold by a refiner f.o.b. its refinery or processing factory;

(d) "Prepaid freight application," commonly known as a "prepay," means a portion of the delivered price for refined sugar equal in amount to a freight charge from a basing point to the customer's location;

(e) "Delivered price" means the price of refined sugar delivered to the customer and generally consists of the basis price plus the prepaid freight application;

(f) "Allowance" means a discount from delivered price;

(g) "Effective selling price" means the price actually charged to the customer by the refiner and generally consists of the delivered price, less any allowance; and

(h) "The Market" means the States of California and Arizona and the Cities of Las Vegas and Reno, Nevada. These states and cities have customarily been described by refiners as the California-Arizona territory.

II

DEFENDANTS

2. Each of the corporations named below is hereby indicted and made a defendant herein. Each is organized and exists under the laws of the state, and has its principal place of business in the city indicated below:

Name of Corporation	State of Incorporation	Principal Place of Business
California and Hawaiian Sugar Company	California	San Francisco, California
Holly Sugar Corporation	New York	Colorado Springs, Colorado
Consolidated Foods Corporation	Maryland	Chicago, Illinois

3. During all or part of the period covered by this indictment, each of the defendant corporations was engaged in the business of processing and selling refined sugar in The Market.

III

CO-CONSPIRATORS

4. Various corporations, firms and individuals not named as defendants in this indictment participated as co-conspirators in the offense charged and performed acts and made statements in furtherance thereof.

IV

TRADE AND COMMERCE

5. Refined sugar is made by processing sugar beets or by refining raw sugar which is derived from crushed sugar cane. Grocery sugar is sold to grocery wholesalers and retailers for eventual sale to consumers; industrial sugar is sold in liquid or dry form in bags or bulk to firms engaged in the preparation and manufacture of food and beverages. Approximately 22 percent of the sugar sold in the United States is sold as grocery sugar; nearly all of the remainder is sold as industrial sugar.

6. Total domestic sales of refined sugar in 1972 amounted to approximately 212 million hundredweights which had a value of about $2.5 billion. Of this, in excess of 23 milion hundred-weights or approximately $268 million worth of refined sugar was sold in The Market. Defendants accounted for over 69 percent of refined sugar sales in The Market.

7. During the period of time covered by this indictment, the defendant California and Hawaiian Sugar Company received substantial quantities of raw sugar derived from sugar cane grown and crushed in the State of Hawaii. There was a substantial and continuous flow in interstate commerce of said raw sugar from the State of Hawaii to the State of California where it was refined by defendant California and Hawaiian Sugar Company and sold in The Market.

8. During the period of time covered by this indictment, substantial quantities of refined sugar, refined or processed in the State of California, was sold and shipped by defendant and co-conspirator corporations to customers located in the State of Arizona and in the Cities of Las Vegas and Reno, Nevada. There was a substantial and continuous flow of refined sugar in interstate commerce from the cane refinery and the sugar beet processing factories of defendants and co-conspirators in the State of California to customers located in the State of Arizona and in the Cities of Las Vegas and Reno, Nevada.

V

OFFENSE CHARGED

9. Beginning sometime prior to 1970, the exact date being to the Grand Jurors unknown, and continuing thereafter at least through 1972, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in The Market in violation of Section 1 of the Sherman Act as amended (15 U.S.C. § 1).

10. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were, among others:

(a) to fix and raise the basis prices of refined sugar;
(b) to fix prepaid freight applications;
(c) to eliminate, reduce and prevent giving of allowances to customers for refined sugar; and
(d) to fix, raise, maintain and stabilize the effective selling price of refined sugar.

11. In formulating and effectuating the aforesaid combination and conspiracy, defendants and co-conspirators did those things

which, as hereinbefore charged, they combined and conspired to do, including, among other things, the following:

(a) caused brokers and other third parties to act as go-betweens in carrying price information and exchanging assurances on price actions between and among refiners;

(b) discussed data and reached agreements concerning the formulation of prepaid freight applications for the purpose and with the effect of maintaining uniform prepaid freight applications; and

(c) published basis price lists and prepaid freight application tables in accordance with agreements reached.

VI

EFFECTS

12. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the price of refined sugar has been raised, fixed, maintained and stabilized at artificial and non-competitive levels;

(b) purchasers of refined sugar have been deprived of free and open competition in the sale of refined sugar; and

(c) competition between and among defendants and co-conspirators has been restricted, suppressed and restrained.

VII

JURISDICTION AND VENUE

13. The aforesaid combination and conspiracy was in part entered into and carried out within the Northern District of California and within the jurisdiction of this Court within five years next preceding the return of this indictment.

Dated:

A TRUE BILL

/s/ ROBERT J. STAAL

Foreman — ROBERT J. STAAL

/s/ THOMAS E. KAUPER — /s/ MARK F. ANDERSON

THOMAS E. KAUPER
Assistant Attorney General — MARK F. ANDERSON

/s/ BADDIA J. RASHID — /s/ CHRISTOPHER S. CROOK

BADDIA J. RASHID — CHRISTOPHER S. CROOK

/s/ GLENDA R. JERMANOVICH

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Appendix 2

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In the United States District Court for the Northern District of California

Original Filed Feb 14 1975
Clerk, U. S. Dist. Court San Francisco

United States of America, *Plaintiff,* vs. California and Hawaiian Sugar Company; Holly Sugar Corporation; and Consolidated Foods Corporation, *Defendants.*	Criminal No. CR-74-829 RHS
United States of America, *Plaintiff,* vs. Great Western Sugar Company; Holly Sugar Corporation; California and Hawaiian Sugar Company; American Crystal Sugar Company; and Amalgamated Sugar Company, *Defendants.*	Criminal No. CR-74-830 RHS

NOTICE OF MOTION AND MOTION TO DISMISS INDICTMENTS

NOTICE IS HEREBY GIVEN that on February 28, 1975, at 9:30 o'clock A.M. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Robert H. Schnacke, 450 Golden Gate Avenue, San Francisco, California, defendant California and Hawaiian Sugar Company, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure and the inherent power of the Court, will move the Court for orders directing that the indictments in the two captioned cases be dismissed.

The motions will be made on the grounds that, in each case, the indictment (a) fails to apprise defendant California and Hawaiian Sugar Company of the charge that it must be prepared to meet, and (b) fails to state the alleged offense with the clarity necessary to protect said defendant against a second prosecution for the same alleged offense. The motions will be based on this notice and motion, the accompanying memorandum of points and authorities and all the papers and other matters on file in each of the captioned cases.

Dated: February 14, 1975.

Respectfully submitted,

MOSES LASKY
BAILEY LANG
JOHN E. MUNTER
WILLIAM S. BOYD
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By /s/ MOSES LASKY
Attorneys for Defendant California and Hawaiian Sugar Company

Appendix 3

Counsel for the Moving Defendants
Appear on Following Page

Original Filed Feb 14 1975
Clerk, U. S. Dist. Court San Francisco

United States District Court
Northern District of California

United States of America, *Plaintiff,* vs. California and Hawaiian Sugar Company; Holly Sugar Corporation; and Consolidated Foods Corporation, *Defendants.*	Criminal No. CR-74-829-ACW
United States of America, *Plaintiff,* vs. Great Western Sugar Company; Holly Sugar Corporation; California and Hawaiian Sugar Company; American Crystal Sugar Company; and Amalgamated Sugar Company, *Defendants.*	Criminal No. CR-74-830-RHS

NOTICE OF MOTION
AND
MOTION BY CERTAIN DEFENDANTS
TO DISMISS INDICTMENTS

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TO: THE UNITED STATES OF AMERICA, PLAINTIFF, and to ROBERT J. STAAL, Attorney for PLAINTIFF

PLEASE TAKE NOTICE that on February 28, 1975, at 9:30 A.M. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Robert H. Schnacke, U.S. District Judge, 450 Golden Gate Avenue, San Francisco, California, defendants Holly Sugar Corporation, Consolidated Foods Corporation, Great Western Sugar Company, American Crystal Sugar Company, and Amalgamated Sugar Company will move, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, for an order directing that the indictments in these cases be dismissed.

The motion will be made on the grounds that (a) the phrase "among others" in the charging allegation of each indictment is so open-ended that it violates defendants' rights to indictment by a Grand Jury, and (b) the indictments fail to state the offense with sufficient clarity to apprise defendants of the charges against them, or to protect defendants against a second prosecution for the same offense.

This motion is based on the Fifth and Sixth Amendments to the United States Constitution; Rule 7(c), Federal Rules of Criminal Procedure; the attached Memorandum in Support, and all applicable authority.

Dated: February 14, 1975

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Appendix 4

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United States District Court
Northern District of California

United States of America, *Plaintiff*, vs. California and Hawaiian Sugar Company; Holly Sugar Corporation; and Consolidated Foods Corporation, *Defendants.*	Criminal No. CR 74-829(RHS)
United States of America, *Plaintiff*, vs. Great Western Sugar Company; Holly Sugar Corporation; California and Hawaiian Sugar Company; American Crystal Sugar Company; and Amalgamated Sugar Company, *Defendants.*	Criminal No. CR 74-830(RHS)

NOTICE OF MOTION AND MOTION TO STRIKE THE PHRASE "AMONG OTHERS" FROM THE CHARGING PARAGRAPHS OF THE INDICTMENTS

NOTICE IS HEREBY GIVEN that on February 28, 1975, at 9:30 o'clock A.M. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Robert H. Schnacke, 450 Golden Gate Avenue, San Francisco, California, the United States, through its attorneys, pursuant to the authorities cited in its memorandum in support and the inherent power of the Court, will move the Court for orders directing that the phrase "among others" in paragraph 10 of the indictment filed in No. 829 and in paragraph 11 of the indictment filed in No. 830 be stricken.

The motions will be made on the ground that the Court may narrow or withdraw a term of a charged conspiracy. The motions will be based on the authorities cited in the memorandum in support, other applicable authority and the inherent power of the Court.

Dated: February 21, 1975.

Respectfully submitted,

/s/ ROBERT J. STAAL

Robert J. Staal

/s/ MARK F. ANDERSON

Mark F. Anderson

/s/ CHRISTOPHER S. CROOK

Christopher S. Crook

/s/ GLENDA R. JERMANOVICH

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Appendix 5

Excerpts from Reporter's Transcript of Proceedings Before the District Court on February 28, 1975

. . . (P. 6 lines 21 & 22)

THE COURT: All right. Let's direct our attention to the motion to dismiss.

* * *

. . . (P. 7 line 8 to P. 8 line 4)

MR. LASKY: I will try to shorten it.

We are here on a motion to dismiss because we submit that these two indictments fail to satisfy the two constitutional requirements, the basic requirements that an indictment must satisfy: One, that it must sufficiently apprise the defendants of what he must be prepared to meet, but for the purposes of this case, more important, it has to be so precise in identifying the alleged offenses as to protect against double jeopardy.

Now, in that connection I emphasize that the application of those principles to the Sherman Act conspiracy case are quite peculiar because of the nature of such a case. It differs even from the ordinary conspiracy case where the conspiracy is unlawful because the acts it contemplates being performed are unlawful either as the goal or the means.

In the Sherman Act case, criminal case, nothing is required to constitute the crime but the pure act of concerting together, the mental meeting of minds. No actual activity need be performed.

So there is no way of identifying the crime of a Sherman Act conspiracy other than to identify with precision the parties to the conspiracy, all of them, and the objectives of the conspiracy.

* * *

. . . (P. 8 line 20 to P. 9 line 18)

Now, what we submit is that this indictment has failed to specify and identify either of these two necessary identifying factors so as to protect against double jeopardy.

Let me turn first to the objective.

Paragraph 10 of one of these indictments, and 11 of the other, are in the same language and what they say is if the objectives to the conspiracy were to enforce said combination, conspiracy, consisted of a continuing agreement and so forth among the defendants and co-conspirators, the substantial terms of which were among others, then A, B, C and D.

The "among others" or some of the objectives here stated designated and characterized as substantial and yet they are left unstated.

Now, the significance of that is this: A conspiracy—

THE COURT: Suppose the "among others" is stricken.

MR. LASKY: Pardon?

THE COURT: Suppose the "among others" is stricken. Do you still address the same objection to the charge?

MR. LASKY: I would submit yes, that the—

THE COURT: Or is that the exclusive vice?

MR. LASKY: No. As to that, I would say the Court lacks the authority and power to strike those words and that is a matter upon which I would say a few words but counsel for Holly had intended to say more.

* * *

. . . (P. 18 line 20 to P. 20 line 23):

THE COURT: Well now, the grand jury has found and has charged each of the items specified in the indictment. If the "and others" language is stricken, it leaves all of the other matters specifically charged by the grand jury and that charge without the "and others" language is, in my view, an appropriate charge.

Now, why under those circumstances cannot the—there is no question but that even with the "and others" language in there, there is a charge presented.

The vice in it lies in the extension of the areas of proof and in the likelihood of a trial (sic) jury being confused and finding on

a verdict that the purpose lay in the "and others" area and not in the specifically charged areas.

That doesn't go to the sufficiency of the indictment as such because it is even with that the allegation of a violation of law.

So why under the circumstances do you contemplate that there is any impropriety in striking the language?

MR. KEKER: There are two reasons, Your Honor. The first is, and they are related, and perhaps opposite sides of the same coin: The first is that to say that the grand jury decided there was a conspiracy to do A through D and that they would have charged that without the "among others" language, requires speculation about what went on in the grand jury room.

The Government has indulged in that speculation in saying that the "and others" language is trivial.

We have indulged in that speculation in explaining to the Court in our opening brief on what the "and others" language could have meant to the grand jurors. We suggest, for example—

THE COURT: Well, it could have meant all sorts of things, but the grand jury does say that there was a conspiracy, that a purpose of the conspiracy was to fix and raise the prices of sugar.

Now, that's an offense and the mere fact that they thought that the purpose of the conspiracy was a variety of other things as well doesn't affect it. It would be a problem if we had a trial jury and we went to the trial jury saying that "If you find that the purpose of this agreement was any of these illegal things or anything else that you think they might have agreed about, then you would have a different situation. But the grand jury has specifically charged that there was a conspiracy and that it was for an illegal purpose.

Now, isn't that the end of it?

MR. KEKER: No, Your Honor, because I will move to the second reason which really is the other side of the first: The Vain (sic) case had exactly the same problem. In the *Bain* case

the charge was that the defendants had defrauded the Controller of the Currency and his agents. The Court decided that with the language "The Controller of the Currency," the indictment could not withstand a demurrer.

So he struck it out and what was left was something that the grand jury had also charged, namely that the defendants had defrauded his agents.

* * *

. . . (P. 21 line 4 to P. 21 line 11)

The point though is that what the *Bain* case was talking about, the problem in the *Bain* case was that you don't know what the grand jury would have done. You don't know whether or not the grand jury would have seen fit—they do have some discretion they exercise and the reason for the Fifth Amendment is that so they may exercise their discretion, they might have seen the charge completely differently and not decided to return an indictment.

* * *

. . . (P. 21 line 20 to P. 22 line 3)

It is not without speculation something that any of us can say that the grand juror would have returned this same charge without the "among others" language. To one or more of the grand jurors it may have been terribly important and for the Court or the prosecutor or the defendants to decide what the grand jury would have done, is simply impermissible under *Bain*.

THE COURT: We know what they have done. All right. Let's hear from your opponent.

* * *

. . . (P. 25 line 14 to P. 26 line 7):

MR. ANDERSON: Well, because the matter certainly is not free from doubt, we are not resting on that argument entirely. We have moved to strike and we have the right to do that under the cases cited in our brief, which allow a narrowing of a portion

of a count, a narrowing of a charge. That is not what happened in the *Bain* case in which defendants relied. There it was much more than a narrowing, it was a material change in the allegation. Reference to "the statements or reports made to the Controller," striking of that language was a material change because that was an integral facet of the charge and the Court said it was probably, very probably the grand jurors relied on that part of the charge and this is the way that later cases have distinguished Bain in allowing a narrowing of the charge.

That is what we are today asking the Court to do and the reason for the motion to strike is not that we concede or believe the indictment is defective without the motion to strike, it is to avoid getting into the kind of problems Your Honor raised earlier at trial.

* * *

. . . (P. 30 lines 3-9):

THE COURT: In order that we are appropriately dealing with the remaining motions, let me first deny these present motions to dismiss and grant the Government's motion to strike and merely state that the indictment does name the defendants, does define the conspiracy and does charge an offense and with appropriate treatment by a bill of particulars, the defendants can be adequately advised.

Appendix 6

United States Court of Appeals
for the Ninth Circuit

Filed March 24, 1975

California and Hawaiian Sugar Company; Holly Sugar Corporation; and Consolidated Foods Corporation, *Defendants-Petitioners,* **vs.** United States District Court, Northern District of California, *Respondent,* United States of America, and Robert J. Staal, its Attorney, *Plaintiff and Real Party in Interest.*	No. 75-1547 75-1548

ORDER

Before: Goodwin and Wallace, Circuit Judges

On consideration of the petition for writ of mandamus filed herein on March 10, 1975, it is ordered:

(1) The above numbered cases are hereby consolidated.

(2) That the clerk shall serve a copy of this order upon the interested district court judge and all parties to the action below. Such service shall be made by mail, and service on the parties may be effected by mailing copies to the parties' attorneys of record in the district court.

(3) Answers to the petition will be filed according to the provisions of Rule 21(b), Fed. R. App. P., and they will be filed within 21 days of the date this order is entered.

(4) Petitioner may file, within 36 days of the date this order is entered a reply to any answers which may be filed.

(5) Following receipt of any responses, the petition shall be passed for consideration to the next regular motions panel.

(6) If the court shall require oral argument, the time for such argument will be subsequently fixed and the parties notified.

(7) All proceedings in the district court are hereby stayed pending disposition of the petitions for writ of mandamus.

Appendix 7

United States Court of Appeals
for the Ninth Circuit

California and Hawaiian Sugar Company; Holly Sugar Corporation; and Consolidated Foods Corp., *Defendants-Petitioners,* vs. United States District Court, Northern District of California, *Respondent,* United States of America and Robert J. Staal, its Attorney, *Plaintiff and Real Party in Interest.*	No. 75-1547
Great Western Sugar Company; Holly Sugar Corp.; California and Hawaiian Sugar Company; American Crystal Sugar Co.; and Amalgamated Sugar Co., *Defendants-Petitioners,* vs. United States District Court, Northern District of California, *Respondent,* United States of America and Robert J. Staal, its Attorney, *Plaintiff and Real Party in Interest.*	No. 75-1548

ORDER

Before: BROWNING and CHOY, Circuit Judges

Upon due consideration, the petition for a writ in the nature of prohibition is denied.

/s/ JAMES N. BROWNING

/s/ HERBERT E. C. CHOY

United States Circuit Judges

Appendix 8

United States Court of Appeals
for the Ninth Circuit

Filed Jun 11 1975
EMIL E. MELEI JR., CLERK
U. S. COURT OF APPEALS

California and Hawaiian Sugar Company, Holly Sugar Corporation and Consolidated Foods Corporation, *Defendants/Petitioners,* vs. The Honorable Robert H. Schnacke, United States District Judge, Northern District of California, *Respondent,* United States of America and Robert J. Staal, its Attorney, *Plaintiff and Real Party in Interest.*	No. 75-1547
Great Western Sugar Company, Holly Sugar Corporation, California and Hawaiian Sugar Company, American Crystal Sugar Company, and Amalgamated Sugar Company, *Defendants/Petitioners,* vs. The Honorable Robert H. Schnacke, United States District Judge, Northern District of California, *Respondent,* United States of America, and Robert J. Staal, its Attorney, *Plaintiff and Real Party in Interest.*	No. 75-1548

ORDER FOR ADDENDUM
CLARIFYING ORDER
OF MAY 19, 1975

Good cause appearing therefor,

IT IS HEREBY ORDERED that the Order of May 19, 1975 be modified to include the following: The stay of all proceedings in the district court entered in this matter on March 24, 1975 is hereby dissolved.

Dated:

/s/ JAMES R. BROWNING

/s/ HERBERT J. C. CHOY

United States Circuit Judges

Appendix 9

United States Court of Appeals
for the Ninth Circuit

Docketed: Jul 3 1975
Filed Jul 2 1975
EMIL E. MELEI JR., CLERK
U. S. COURT OF APPEALS

California and Hawaiian Sugar Company, et al., *Defendants-Petitioners,* vs. United States District Court, Northern District of California, *Respondent,* United States of America, and Robert J. Staal, its Attorney, *Plaintiff and Real Party in Interest.*	No. 75-1547
Great Western Sugar Company, et al., *Defendants-Petitioners,* vs. United States District Court, Northern District of California, *Respondent,* United States of America, and Robert J. Staal, its Attorney, *Plaintiff and Real Party in Interest.*	No. 75-1548

ORDER

Before: BROWNING and CHOY, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Supreme Court, U. S.
FILED
SEP 30 1975
MICHAEL RODAK, JR., CLERK

No. 75-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1975

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-163

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals abused its discretion in declining to issue a writ of prohibition after the district court struck language from the indictments that was not essential to state an offense.

In December 1974, the grand jury for the Northern District of California returned two indictments, charging petitioners [1] and others [2] with having entered into a combination and conspiracy in unreasonable restraint of trade sometime prior to 1970 and continuing through at least 1972, in violation of Section 1 of the Sherman Act, "the substantial terms of which were, *among others*:

(a) to fix and raise the basis prices of refined sugar;

(b) to fix prepaid freight applications;

(c) to eliminate, reduce and prevent giving of allowances to customers for refined sugar; and

(d) to fix, raise, maintain and stabilize the effective selling price of refined sugar" (Pet. App. 5; emphasis supplied).

Petitioners moved to dismiss the indictments on the ground that the phrase "among others" therein failed adequately to apprise them of what they must be prepared to meet. The government contended that the indictments were valid, and alternatively moved

[1] Petitioner California and Hawaiian Sugar Company was named as a defendant in both indictments; petitioner American Crystal Sugar Company was named as a defendant in one indictment.

[2] On motions under Rule 60(2), the Court on September 18, 1975 dismissed the petition for a writ of certiorari as to Union Sugar Division, Consolidated Foods Corporation; Holly Sugar Corporation; Great Western Sugar Company; and Amalgamated Sugar Company.

to strike the words "among others". The district court granted the motion and ordered the words "among others" stricken (Pet. 4-6).

The defendants then applied to the court of appeals for a writ of prohibition against all further proceedings in the district court, on the ground that by striking words from the indictments the district court had voided them and that it was therefore deprived of jurisdiction, under the rule announced in *Ex parte Bain*, 121 U.S. 1. The court of appeals denied the petition without opinion (Pet. App. 24-25).[3]

1. The court of appeals acted well within its discretion in declining to issue a writ of prohibition in this case. An extraordinary writ is a drastic remedy to be used only in unusual circumstances where other remedies are unavailable. *Alexander* v. *Crollott*, 199 U.S. 580. Since petitioners may challenge the district court's elimination from the indictment of the phrase "among others" on appeal of their convictions, there was no occasion for the court of appeals to issue a writ of prohibition to review the question at this juncture.[4]

[3] On July 31, 1975, petitioner American Crystal Sugar Company pleaded *nolo contendere* in the district court. The trial of petitioner California and Hawaiian Sugar Company is scheduled to commence on November 10, 1975.

[4] See *Roche* v. *Evaporated Milk Assoc.*, 319 U.S. 21; *Parr* v. *United States*, 351 U.S. 513; *Tidewater Oil Co.* v. *United States*, 409 U.S. 151; *In re Rice*, 155 U.S. 396; *In re Huguley Mfg. Co.*, 184 U.S. 297; *Witherspoon* v. *Walsh*, 463 F.2d 951 (C.A.D.C.); *United States* v. *Green*, 414 F.2d 1174 (C.A.D.C.);

2. In any event, the district court's decision to strike the phrase "among others" from the indictments did not deprive petitioners of any constitutional rights. Their Fifth Amendment right to a grand jury indictment in a "capital, or otherwise infamous crime" was inapplicable, since at the time of the alleged conspiracy a violation of the Sherman Act was only a misdemeanor and the maximum penalty was $50,000 or imprisonment for one year, or both.[5] See 18 U.S.C. 4083; Rule 7(a), Fed. R. Crim. P. Moreover, there is no realistic possibility that the grand jurors would have declined to indict petitioners had the phrase "among others" not been included in the indictments. Nor were petitioners deprived of their Sixth Amendment right to be informed of the nature and cause of the accusation against them, since the phrase "among others" was surplusage.

3. Finally, contrary to petitioners' assertion, there is no clear conflict among the circuits on whether a district court may strike or disregard a portion of the indictment that is not essential to the offense.[6]

In re Alix, 166 U.S. 136; *General Tire and Rubber Co.* v. *Watkins*, 326 F.2d 926 (C.A. 4), certiorari denied, 377 U.S. 909.

[5] 15 U.S.C. 1. The Antitrust Procedures and Penalties Act, 88 Stat. 1706, which went into effect December 21, 1974, makes violations of the Sherman Act a felony and provides a maximum penalty of three years' imprisonment or $100,000 individual fine, or both.

[6] The decisions upon which petitioners rely (Pet. 10-14) involve the substitution in the indictment of different allegations (*United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (C.A. 2); *United States* v. *Williams*, 412 F.2d 625 (C.A. 3); *United States* v. *Goldstein*, 502 F.2d 526 (C.A. 3)); or the issuance of an indictment which had not been reviewed by all the members of the grand jury (*Gaither* v. *United States*, 413 F.2d 1061 (C.A.D.C.)). Any conflict within the Ninth Circuit presents a matter appropriate for resolution by that Court *en banc*.

To be sure, a court may not add charges to an indictment; as this Court restated the rule it first enunciated in *Ex parte Bain*, 121 U.S. 1, upon which petitioners primarily rely, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217. But a district court may strike from an indictment language, such as that in the instant case, that is surplusage.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[7] *United States* v. *Krepper*, 159 F.2d 958 (C.A. 3); *Thomas* v. *United States*, 398 F.2d 531 (C.A. 5).

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